ANNULLED by San Mateo City School District v. PERB (1983) 33 Cal.3d 850, and REPLACED by Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN MATEO ELEMENTARY TEACHERS' ASSOCIATION, CTA/NEA, Charging Party, and SAN MATEO CITY SCHOOL DISTRICT, Respondent.	Case No. SF-CE-36 PERB Decision No. 129 May 20, 1980

Appearances: Rubin Tepper, Attorney for San Mateo Elementary Teachers' Association, CTA/NEA; J. Michael Taggart, Attorney (Paterson and Taggart) for San Mateo City School District.

Before Gluck, Chairperson; Gonzales, and Moore, Members.

DECISION

This case is before the Public Employment Relations Board (formerly Educational Employment Relations Board and hereinafter referred to as PERB) on exceptions raised by the respondent San Mateo City School District (hereafter District) to the attached hearing officer's decision. The amended unfair practice charge filed by the San Mateo Elementary Teachers' Association (hereafter SMETA) alleged that the District violated section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA)[1] by refusing or failing to

[1]The Educational Employment Relations Act is codified at section 3540 et seq. of the Government Code. Unless noted otherwise herein, all statutory references are to the Government Code.

meet and negotiate in good faith over the length of the instructional day, preparation time, and rest time. SMETA also alleged that the District, during the 1976-1977 and 1977-1978 negotiations, unilaterally adopted changes in the length of the teachers' instructional day and preparation time. The District denied that such changes affect hours of employment, asserting that such matters are outside the scope of representation as defined in section 3543.2.

After a hearing, the PERB hearing officer concluded that the District violated section 3543.5(c) during the 1976-1977 negotiations by refusing to negotiate on instructional time and preparation time and by unilaterally lengthening the instructional day and concomitantly reducing preparation time. He further concluded that although there was a violation as to preparation time during 1977-1978 negotiations, there was none committed then with respect to instructional time. He decided that the Association failed to prove that rest time is a proper subject of negotiation and, therefore, declined to determine whether the District had negotiated in good faith as to this subject.

The District excepts to the hearing officer's determinations that the instructional day and preparation time are within the scope of representation and that its unilateral changes constituted refusal to negotiate in good faith. The District also argues that the 1976-1977 contract reached by the parties mooted the issues raised in the charge.

FACTS

On May 13, 1976, the District recognized SMETA as the exclusive representative of its certificated employees. In July 1976, SMETA submitted its initial contract proposals for 1976-1977, which included provisions regarding instructional duty time, preparation time, and rest time. In September, the parties commenced negotiations which continued until February 1, 1977.

On November 9, 1976, the District's Board of Trustees formally adopted changes in its Policy and Regulation 6112.[2]

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[2]Policy 6112, as modified, provided in pertinent part:

> The Board of Education shall adopt a schedule for lengths of the school day upon recommendation of the Superintendent, cognizant of the requirements of the State Education Code and the diverse educational needs of the students.

Regulation 6112, as modified, provided in pertinent part:

> Daily schedules of classes shall be determined by the principal of each school with the approval of the Superintendent. Schedules adopted should meet all state laws and district regulations.
>
> Variations in the schedules are permissible at discretion of the Principal when adjustments are necessary to reconcile class and bus schedules or when adjustments will provide better utilization of school time for instructional or administrative purposes. All variations must have the prior approval of the Superintendent of Schools.

The change effectively lengthened the minimum instructional day[3] as of January 1977, by adding six minutes of instructional time per day and subtracting thirty minutes of teacher preparation time allocated on Wednesdays. The overall 7 1/4-hour workday and the duty-free lunch period for teachers remained unaltered. According to the District, this measure was necessary because of parental concerns that the District had the shortest instructional day of all school districts in San Mateo County. On December 13, 1976, SMETA filed this unfair practice charge.

The parties continued to negotiate. On February 1, 1977, following mediation, the District and SMETA agreed to a contract, the duration of which was through June 30, 1977 and thereafter until one of the parties served written request for renegotiation. Wage issues were resolved but the issue of hours was specifically left unaddressed pending resolution of the instant unfair practice case.

Shortly thereafter the parties began negotiations for 1977-1978. SMETA resubmitted its proposal of 1976-1977 on the instructional day. The District did not respond on this issue. It did acknowledge in its memorandum of March 8, 1977 to SMETA that if the PERB ruled the instructional day within

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[3]See Education Code section 46100 et seq. which mandates the minimum instructional day in public schools.

the scope of representation, the reopener clause of the 1976-1977 agreement could be utilized to negotiate the instructional day issue.

SMETA also proposed not less than one hour of preparation time and a twenty-minute rest period for each two hours of instructional time. The District contended that unused noninstructional time was excess time which teachers could use for preparation. If, however, a teacher could not complete the necessary preparation for classroom work on unallocated time, the District expected teachers to use time outside of school to prepare. In response to SMETA's proposal on rest time, the District proposed that employees would have a break for personal needs every two hours. There is no evidence in the record either that SMETA sought further negotiations or that the District subsequently refused to discuss rest time.

On April 19, 1977, the District again adopted changes in Policy and Regulation 6112,[4] effective September 1977. These

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[4]Policy 6112, as again modified, provided in pertinent part:

> The San Mateo City School District will provide an educational program for all children with the maximum amount of instructional time in school consistent with sound educational practice.
>
> The Board of Education adopts the following minimum and maximum lengths for the instructional day. These times for the

changes increased the instructional day by 30 minutes and would have eliminated the Wednesday preparation period entirely if the existing staggered class schedules were maintained.

> instructional day are indicated as average minutes per day for a five-day period and exclusive of passing time, lunch, recess and other non-instructional activities.

	Minimun	Maximum
Kindergarten	180	180
Grades 1-2	260	300
Grade 3	280	310
Grades 4-5	300	330
Grades 6-7-8	315	345

> The range for the length of the instructional day at each grade level provides for the uniqueness of each school community, for the increasing maturity of the children and for the opportunity of the instructional staff to see more effective ways to educate children. Should a school wish to develop a schedule which exceeds the range of minutes for the length of the average instructional day at any grade level, such approval may be given by the Board of Education, upon recommendation of the Superintendent of Schools.

Regulation 6112 in pertinent part provides:

> Daily schedules for each school shall be determined by the principal of each school with the approval of the Superintendent and the Board of Education. School schedules should meet all state laws, policies of the Board of Education, and district regulations.
>
> The minimum and maximum length of the average instructional day for each grade is set forth in Policy 6112. Should a school wish to adopt a schedule with the length of the instructional day different than these

DISCUSSION

The scope of representation is set out in section 3543.2:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" means health and welfare benefits as defined by section 53200, leave, transfer, and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to section 3546, procedures for processing grievances pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to section 44949.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and cirriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . .

The question before the Board is whether any of the disputed subjects--length of the instructional day, preparation time, and rest periods-falls within the scope of negotiations as defined by section 3543.2. It is the Association's contention that the matters are covered under the term "hours

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minimum and maximum times, a specific exception must be made for each school year. Policy 6112 designates the average times for a five-day period.

of employment." The District contends that the subjects are matters of educational policy and, therefore, outside of scope.

Reference to private sector experience is marginally helpful as there has been little litigation based on the term "hours of employment." Because, unlike EERA, the National Labor Relations Act (hereafter NLRA)[5] does not have limiting language defining "terms and conditions of employment," the case law developed under the federal statute tends to blur the distinction between "hours" and "terms and conditions." The NLRA does not require that distinctions be made between categories of mandatory subjects of bargaining. Nevertheless, an examination of NLRB and judicial treatment of bargaining subjects concerning hours and nonwork time is useful in deciding the issues presented by this case.[6]

In Amalgamated Meat Cutters v. Jewel Tea Co. (1965) 381 U.S. 676, 691 [59 LRRM 2376], the Supreme Court expressed the obligation as follows:

> The particular hours of the day and the particular days of the week during which employees may be required to work are subjects well within the realm of wages, hours and other terms and conditions of employment about which employers and unions must bargain.

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[5] 29 USC section 151 et seq.

[6] Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

Pursuant to this general principle, the obligation to negotiate was held to include whether working hours were to fall in the daytime, nighttime, or Sundays.[7] In Weston & Brooker Co. (1965) 154 NLRB 747 [60 LRRM 1015] the National Labor Relations Board, citing NLRB v. Katz (1962) 396 U.S. 736 [50 LRRM 2177], held that the length of the workday was a mandatory subject of negotiations and that an employer's unilateral change in that workday constituted a violation of its obligation to negotiate in good faith. In Camp & McInnes, Inc., (1952) 100 NLRB 524 [30 LRRM 1310], the employer was found to be in violation for having, inter alia, unilaterally reduced the lunch period. Certain other matters, such as vacations, holidays, sick leave, and other nonwork time issues have been found to be subject to negotiations under the phrase "other terms and conditions of employment."[8]

It is true that the definition of "terms and conditions of employment" contained in section 3543.2, does not include among the enumerated items those matters which are in dispute in this case. But, it is reasonable to conclude that the Legislature

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[7]Morris, Developing Labor Law, page 404, fn 69.

[8]NLRB v. Katz, (1962) 369 U.S. 736 [50 LRRM 2177]; NLRB v. Sharon Hats, Inc., (1961) 289 F.2d 628 [48 LRRM 2098]; Great Southern Teaching Co., v. NLRB (1942) 127 F.2d 180 [10 LRRM 571]. See also Kendell College (1977) 228 NLRB 1083 [95 LRRM 1094], holding that class schedules of college teachers are included in the term "hours."

in so limiting the phrase "other terms and conditions of employment" sought only to satisfy two basic objectives: (1) exempting from the scope of negotiations certain matters of fundamental educational policy over which managerial control was to be preserved as essential to achievement of the constitutional and statutory mission of the school district and, (2) the designation of specifically approved subjects which may bear no relationship to wages or hours of employment and, therefore, could not be covered by those two "umbrella" terms. In other words, by limiting "terms and conditions of employment" to the enumerated items, the Legislature did not intend to exclude all other subjects which <u>are</u> considered negotiable terms and conditions under the NLRA, but which are not specifically listed in EERA.

It is for this reason that EERA adopts a phrase not found in the NLRA: "all matters related to." Therefore, to determine whether a non-enumerated item is within scope, it is necessary to find that it is logically and reasonably related to wages, hours or an enumerated subject under "terms and conditions of employment."

Central to its opposition to a finding that any of the disputed items falls within the meaning of "hours of employment" is the District's contention that each involves a question of educational policy reserved to its unilateral decision-making authority. First, assuming, <u>arguendo</u>, that

educational policy matters are, per se, outside the scope of bargaining, the District's position fails to consider that to the extent that a lawful management decision affects the employees' wages, hours or negotiable terms and conditions of employment, the consequences of that decision are subject to mandatory negotiations. Even where the employer has been excused from an obligation to negotiate a decision which lies at the core of entreprenurial control, his duty to negotiate over the impact of that decision remains.[9]

Second, the District's contention that negotiating on these items would bring matters of educational policy into the collective bargaining arena and out of the hands of parent/teachers associations, students, and parents in the community is without foundation. The District's position that the concurrent presence of educational policy considerations precludes negotiability would virtually, if not totally, eliminate all subjects of bargaining. The matter of wages might well run head-long into a management decision to expend available revenues on additional classroom equipment and textbooks; length of working day or the number of working days per year might well clash with the scheduling of student

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[9] Fibreboard Paper Products v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]; NLRB v. Transmission Navigation Corp. (1967) 380 F.2d 933 [65 LRRM 2861]; NLRB v. Royal Plating & Polishing Co. (1965) 350 F.2d 191 [60 LRRM 2033].

classroom requirements;[10] teacher evaluation procedures, specifically negotiable under section 3543.2, might fall victim to policy determinations related to the quality of education provided.

The obligation to deal with the employees over related issues of employee relations arising out of educational policy decision-making does not require or entail a surrender of those central managerial prerogatives which remain unchallenged. Here, for example, the District's unilateral right to increase the student's instruction time is not disputed. But, where the teacher's concern with their wages and hours and terms and conditions of employment tend to conflict with that managerial decision, it is the very funcion of the mediatory influence of collective negotiations to resolve such conflict.[11]

Third, the District's contention erroneously implies that the obligation to negotiate is tantamount to the obligation to acquiesce.[12]

Just as the presence of educational policy considerations does not per se exclude a given subject from scope, so the mere

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[10]See Palos Verdes Peninsula Unified School District/Pleasant Valley School District, (7/16/79) PERB Decision No. 96 holding that the number of workdays per year is subject to negotiations.

[11]See Palos Verdes/Pleasant Valley, id., at pp 31-32.

[12]See San Francisco, Community College District (10/12/79) PERB Decision No. 105, p. 11.

presence of employee concerns over wages, hours, or terms and conditions of employment does not require negotiations on all matters which impact on educational policy. There are at the core of the managerial function certain policy matters which are so fundamental to the basic achievement of the agency's mission, or which impinge so tangentially and minimally on employee interests that they may be properly excluded from the bargaining arena.

Thus, the Board may be faced with a need to balance the competing interests represented by management's obligation to fulfill the mission of the District on the one hand, and employee concerns with wages, hours and terms and conditions of employment, on the other. Similarly, we must reconcile the apparently contradictory statutory phrases: "limited to" and "all matters relating to." The first phrase evinces a legislative decision to grant a more restricted scope of negotiability than that provided by the NLRA; the latter phrase provides a latitude greater than that which would result from a narrow construction of the "terms and conditions" statutory language.

The threshold question of negotiability inevitably turns on whether the subject of the proposal "relates to" wages, hours, or the enumerated terms and conditions of employment. The relationship need not be so direct or obvious as to be little more than synonomous with a mandatory subject, but the proposal must logically and reasonably relate to a statutory subject.

If a proposal arguably meets the threshold test, it may be necessary to apply the balancing test where the issue is neither patently within or outside scope. The Board should then consider:

a) whether the subject is of such concern to both management and employees that conflict is likely to occur and whether the mediatory influence of collective bargaining is the appropriate means of resolving the conflict, and b) whether the enployer's obligation to negotiate would significantly abridge his freedom to exercise those managerial prerogatives essential to achievement of the District's mission, Palos Verdes/Pleasant Valley, supra. See also Fibreboard Paper Products v. NLRB, supra; Allied Chemical and Alkalai Workers v. Pittsburgh Plate Glass (1971) 404 U.S. 157 [78 LRRM 2974].

Measured by these tests, the Board finds that length of the instructional day, preparation time and rest periods are "matters related to the hours of employment" over which the District is obligated to negotiate.

Rest Periods

The hearing officer's grounds for finding that the Association "failed to prove" that rest time is negotiable and his conclusion, without explanation, that the subject is not negotiable are unclear. The relevant fact before the hearing officer was undisputed: the Association proposed twenty minutes of relief time from work for purposes of rest every two hours.

The issue of law clearly raised by this proposal is whether the subject is within the scope of negotiations defined in section 3543.2.

The negotiability of "hours of employment" includes, of necessity, negotiability of the hours during which employees are not required to work. They are but different sides of the same coin. It is not possible to negotiate a 7 1/4-hour workday without indirectly "negotiating" a 16 3/4-hour work-free day. Similarly, it is inherent in the negotiability of the workday that one may deal with the placement and duration within that time frame of lunch periods and the designation and nature of relief time from the performance of one's duties.[13] Nothing in the record here suggests that the obligation to negotiate on these matters would significantly abridge an employer's ability to fulfill the mission of the District. Thus, the subject of rest periods falls within the scope of mandatory collective negotiations.

Instructional Day and Preparation Time

The instructional day includes two distinguishable elements: the amount of time students are required to be in

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[13]"What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of employment." Fireboard Paper Products v. NLRB (1964) 379 U.S. 203 at 222 [57 LRRM 2609], concurring opinion of Justice Stewart.

school for instruction and the amount of time teachers are required to spend during the working day instructing students. Although the two may coincide, they are not necessarily identical. Nor, is the teachers' instructional day synonymous with their working day. In this instance, teachers are required to be at school for 7 1/4 hours per day. However, not all of this time is spent in instructing students. Some portion of the workday has been utilized for instructional preparation and it is undisputed that the District requires and the job mandates that teachers spend some time in that activity.[14]

As a requirement of the teaching "job," preparation time is a component of the teachers' employment obligation in the same sense as are classroom instruction and other mandated duties such as parent-teacher conferences, giving examinations, or grading students. While it may be conceded for purposes of this case, the matter not being in issue, that the District's requirement that teachers "prepare" for instruction is a matter of managerial prerogative not subject to negotiations, to the

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[14]While the definition of preparation time is not clearly demonstrated in the record before the Board, it apparently includes planning for and preparation of the subject matter to be covered in class, arranging for the availability and distribution of teaching aids and materials, and review of student records; in brief, a combination of professional and ministerial activities designed to expedite the presentation of educational subject matter.

extent that requirement relates to the teachers' hours of employment, the matter is subject to bilateral determination.

Here, the length of the teachers' instructional day was unilaterally altered by the District. The effect of that alteration was to reduce the amount of time available for required preparation. Indeed, the District acknowledged that preparation duties would have to be fulfilled not only during duty-free or personal-use hours enjoyed by the teachers, but even during hours outside the teachers' regular 7 1/4-hour workday. Such a requirement constitutes an extension of the employees' 7 1/4 hour workday.

It is for the same reason that the District cannot claim that changing the length of the instructional day and the resulting modification of preparation time merely constitute a reshuffling of work assignments within a fixed workday and is a pure work-scheduling prerogative. Had the District's actions not impinged on the employees' personal time, both during and outside the working day, that argument might be given greater consideration here. But such is not the case. Indeed, the ultimate effect of the District's action here could impinge not only on the teachers' interest in hours of employment but on their wages as well. It is a necessary concomitant of extending the workday that the relationship between compensation and working hours is altered, the unit of pay per unit of working time being reduced.

In Palos Verdes/Pleasant Valley, supra, the Board found that the length of the teachers workday was negotiable and that the District's obligation to negotiate on this subject did not interfere with its freedom to exercise essential managerial prerogatives. The District retained the freedom to decide where and for how long students would be required to attend class. The Board acknowledged that the District's determination of student obligations and the teachers' interests in the length of their instructional day could lead to conflict. It was the Board's view that such conflicts are best accommodated through the collective negotiation process. The same principle applies here. While the District may extend student instructional time, it may not, at the same time, unilaterally modify the teachers' working time or refuse to negotiate proposed changes in the teachers' working time.

Implicit in the District's proposal that preparation for classroom instruction be performed during duty-free time or after the close of the workday is the theory that preparation is a personal obligation of a professional occupation. The record here plainly indicates that preparation for instruction is a requirement imposed on the teachers by the District. Such preparation is, therefore, a condition of employment, an aspect of the teachers' obligatory job duties. Because it is a "professional" responsibility hardly distinguishes preparation from any other aspect of the teaching job, which, excepting

some peripheral and minor "paperwork" duties, is in its totality a professional occupation. To segregate required components of the total teaching obligation into negotiable and non-negotiable categories is to create an artificial distinction. To the extent that preparation time is a condition of employment which relates to hours of employment, it is properly a subject of negotiations.

In summary, to the extent that a change in the length of the teachers' instructional day affects the length of the working day or existing duty-free time, the subject is negotiable. Similarly, at least to the extent that changes in available preparation time affect the length of the employees' workday or duty-free time, that subject is negotiable.

Waiver

As an alternative defense to the charge alleging a refusal to meet and negotiate on the instructional day, the District argues that the 1976-1977 contract constituted a waiver by SMETA of its right to negotiate any items for the remainder of the school year. The evidence amply proves otherwise.

Section "C" of the agreement[15] indicates that SMETA waived the right to further negotiation of terms within the

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[15]Limitations on Further Negotiations for 1976-77

> It is the desire and intention of the parties not to require further negotiations effecting 1976-77 contract year either for a

scope of representation except when the District changes policy for reasons other than an emergency. The agreement also states that the "zipper" clause in Section "D-8"[16] was expressly not intended to negate Section "C". At the hearing, the parties stipulated that the District was not impelled by an emergency to change the length of the instructional day. Testimony also indicated that during mediation, the subject of hours was specifically left unaddressed pending resolution of this charge

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> comprehensive contract covering all issues within scope of negotiations or regarding singular issues within scope. SMETA expressly waives the right to further negotiations effecting 1976-77 contract year, except in cases where the District has initiated change (or proposal for change to take effect during 1976-77), other than in cases of actual emergency regarding matters which are properly within the scope of negotiations.

[16]Completion of Meet and Negotiation

> During the term of this Agreement, the Association expressly waives and relinquishes the right to meet and negotiate and agrees that the District shall not be obligated to meet and negotiate with respect to any subject or matter whether or not referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both the District or the Association at the time they met and negotiated on and executed this Agreement, and even though such subjects or matters were proposed and later withdrawn. (For 1976-77 this article shall not negate item C.)

and that Section "C" was included in the contract to allow SMETA to pursue the charge. Not only did the parties engage in mediation with the understanding that the unfair practice dispute would be resolved by the PERB, but the contract itself accommodates SMETA's pursuit of such resolution.

Absent clear and unequivocal language or conduct to the contrary, PERB will not readily infer that a party has waived a statutory right.[17] Far from explicitly relinquishing or implicitly abandoning its request to negotiate, SMETA actively pursued its right through the only means available to it, these unfair practice proceedings.

For all the preceding reasons, the Board finds that the District violated section 3543.5(c) of the EERA by refusing during the 1976-1977 sessions to meet and negotiate in good faith over the effects of changes in the length of the student instructional day on teacher instructional day and preparation time.

We also find that the District violated section 3544.5(c) by refusing during the 1976-1977 sessions to meet and negotiate with respect to rest time, and that the District's conduct in unilaterally increasing teacher preparation time in January

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[17] NLRB v. Perkins Machine Co. (1st Cir. 1964) 326 F.2d 488 [55 LRRM 2204]; Timkin Roller Bearing Co. v. NLRB (6th Cir. 1963) 325 F.2d 746 [54 LRRM 2785]; Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74.

1977 constituted a refusal to meet and negotiate in good faith within the meaning of that section.

The 1977-1978 Negotiations

The hearing officer concluded that the evidence was insufficient to support a conclusion that the District unlawfully refused to negotiate with respect to instructional day in the 1977-78 meetings. SMETA presented its initial proposal which the District refused to discuss. SMETA did not press the issue further. It is clear that any additional efforts by SMETA to reintroduce the subject of instructional time into negotiations would have been rejected by the District. The District failed even to respond to SMETA's proposal. Furthermore, the District's position in 1976-1977 indicated no likelihood of eventual discussion of its own volition. To the contrary, the District was adamant in its determination that it was not obligated to negotiate any aspect of the instructional day with SMETA. To require SMETA to engage in an additional series of requests for negotiation in these circumstances would be to require SMETA to engage in a predictably futile act.

Accordingly, we find that the District's 1977-1978 refusal to discuss teacher instructional day with SMETA constitutes a refusal to negotiate violative of EERA section 3543.5(c).

The hearing officer concluded that the District had unlawfully refused to negotiate with SMETA about teacher

preparation time during the 1977-1978 sessions. The District contends that this finding was premature because the parties were still engaged in negotiations at the time of the hearing.

According to the District, it submitted a purported counterproposal on preparation time during the 1977-1978 sessions. The District's "proposal" was that unassigned time during the workday would constitute preparation time. The hearing officer correctly found that this "proposal" was really no counterproposal at all. It merely reduced to writing the District's original stance that it was under no obligation to negotiate about designating time for preparation. The District's so-called counterproposal lacks the essence of the effort to reach agreement implicit in the definition of good faith negotiation. Accordingly, we find that the District unlawfully refused to negotiate about teacher preparation time during the 1977-1978 sessions.[18]

Finally, SMETA contends that the District refused to negotiate rest time during the 1977-1978 sessions. The District did, in fact, present at least one substantive proposal on this matter. The record discloses no evidence

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[18]See NLRB v. Montgomery Ward (9th Cir. 1943) 133 F.2d 676 [12 LRRM 508]; NLRB v. Boss Mfg. Co. (7th Cir. 1941) 118 F.2d 187 [8 LRRM 729], cert. denied (1941) 313 U.S. 595; Inter Polymer Industries, Inc. (1972) 196 NLRB 729, [80 LRRM 1509]; San Isabel Electric Services, Inc. (1976) 225 NLRB 1073 [93 LRRM 1055].

that the District subsequently resumed the 1976-1977 posture that it was not obligated to negotiate about rest time. Accordingly, we dismiss the allegation that the District refused to negotiate rest time during the 1977-1978 sessions.

REMEDY

As a remedy for the violations,[19] the Board orders that the District return to the status quo ante by reinstating the

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[19]The Board's remedial authority is found in sec. 3541.3:

> The Board shall have all of the following powers and duties:
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> .....
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> (i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.
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> .....
>
> (n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

and in sec. 3541.5:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the Board . . . .
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> .....
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> (c) The Board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

schedule with respect to preparation time and duty-free time that was in effect prior to January 1, 1977. In recognition of the fact that a substantial period of time has elapsed since the appeal of the hearing officer's decision in this case, we acknowledge the possibility that the parties may have agreed to some other schedule which is mutually satisfactory. However, we know of no such accommodation. To maximize the flexibility of the Board's order, we expressly leave with the SMETA the right to waive the requirement that the District reinstate the schedule.

The Board further orders that the parties return to the bargaining table, should SMETA so request, to negotiate with respect to teacher instructional time, preparation time and rest periods.

The District shall also be required to sign and post the Notice to Employees attached as Appendix to this Decision and Order.

To effectuate the policies and purposes of the EERA the employees affected by the District's unlawful conduct should be notified of the Board's order and of the District's readiness to comply. Posting the attached Notice to Employees will satisfy this purpose.[20].

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[20]A similar requirement has been upheld by the United States Supreme Court interpreting section 10(c) of the Labor Management Relations Act, as amended, which is nearly identical

ORDER

Upon the foregoing facts, conclusions of law, and entire record in this case, and pursuant to Government Code 3541.5(c), it is hereby ORDERED that the San Mateo City School District and its representatives shall:

A. CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the San Mateo Elementary Teachers' Association with respect to teacher preparation and rest time and teacher instructional day.

(b) Unilaterally changing the hours of employment, including length of the day, rest time, preparation time, or other conditions of employment without negotiating with the San Mateo Elementary Teachers' Association.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Reinstate the schedules with respect to preparation time and rest periods that were in effect prior to January 1, 1977, if the

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to section 3541.5(c) in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415]. New York's highest court has upheld a posting requirement ordered by the New York Public Employment Relations Board against a public agency. (City of Albany v. Helsby (1972) 327 N.Y.S.2d 658 [79 LRRM 2457]].

Association so requests.

(2) Upon request, meet and negotiate in good faith with the San Mateo Elementary Teachers' Association with respect to preparation time and the length of teachers' instructional day.

(3) Post copies of the attached notice marked "Appendix" in conspicuous places where notices to employees are customarily placed at its headquarters' office and at each of its school sites for 20 consecutive workdays. Copies of this notice, after being duly signed by the superintendent of the District, shall be posted immediately after receipt thereof. Reasonable steps should be taken to insure that said notices are not altered, defaced or covered by any other material.

(4) Notify the San Francisco regional director of the Public Employment Relations Board in writing within 20 days from the receipt of this decision, of what steps the District has taken to comply herewith.

This order shall become effective immediately upon service of a true copy thereof on the San Mateo City school District.

By: Harry Gluck, Chairperson

Member Barbara D. Moore's concurrence begins on page 29.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS BOARD

An Agency of the State of California

After a hearing in unfair practice case No. SF-CE-36, in which all parties had the right to participate, it has been found that the San Mateo City School District violated the Educational Employment Relations Act by failing and refusing to meet and negotiate with the San Mateo Elementary Teachers' Association with respect to preparation time and effects of changes in the length of the instructional day. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

WE WILL NOT fail or refuse, upon request, to meet and negotiate with the San Mateo Elementary Teachers' Association with respect to teacher preparation and rest time and teacher instructional day.

WE WILL NOT CHANGE the wages, hours of employment, or other terms and conditions of employment without negotiating with the San Mateo Elementary Teachers' Association.

San Mateo City School District

By: _____

Dated: _____

Member Moore, concurring:

While I agree with the result reached by Chairperson Gluck, I disagree with certain aspects of his discussion concerning the interpretation of the scope of representation language set forth in section 3543.2 of the Educational Employment Relations Act (hereafter EERA or Act).

Because many provisions of EERA are patterned on the National Labor Relations Act (hereafter NLRA), I do not view it as inconsequential or serendipitous that the Legislature drafted the critical language governing the scope of representation in EERA in a manner which differs sharply from that found in the NLRA.[1] While this departure from the NLRA is clear, a definitive interpretation of section 3543.2 is less clear.

In an effort to interpret section 3543.2, it is necessary to reconcile certain phrases which suggest ambiguous if not conflicting results. The Legislature's specific definition of

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[1]Section 8(d) of the NLRA provides in pertinent part:

> For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .

Section 3543.2 governs the scope of representation under EERA and is set out in full at page 7, <u>supra</u>.

the phrase "other terms and conditions of employment" and the instruction that the scope of representation be "limited to" wages, hours and those enumerated subjects seem to urge a limited view of scope. This suggestion, however, must be considered in light of the Legislature's directive, again unlike the NLRA, that "matters relating to" wages, hours and the enumerated terms and conditions of employment are subject to the negotiating process. This language appears to urge a broadening of the scope of representation to include a zone of related though unspecified subjects.

I have considered the language of section 3543.2 in its entirety and have reached two conclusions. First, I agree with the Chairperson's finding that the Legislature did not intend to exclude from the negotiating process all subjects which are bargainable terms and conditions of employment under the NLRA but which are not listed in section 3543.2 of EERA. The basis for this result stems from the "relating to" language which must bring some non-enumerated subjects within scope or that language would be a nullity. Fundamental rules of statutory construction require that some meaning be given to all statutory phrases employed. (Siler v. Industrial Accident Commission (1957) 150 C.A.2d 157 [309 P.2d 910].) I also conclude, however, that the Legislature's adoption of EERA's unique statutory language reveals its intent to grant a narrower scope of representation than that afforded by the

NLRA. The "limited to" language plainly points to such an interpretation.

The Chairperson opines that the specific enumeration of terms and conditions was designed "to satisfy only two basic objectives." (Ante, p. 10.) I am unable to concede that the Legislature's objectives are necessarily as clearly discernible or as limited as his opinion suggests.

In addition to specifying items not related to wages and hours, the Chairperson asserts that by enumerating terms and conditions the Legislature's sole remaining objective was to exempt from scope certain matters of fundamental educational policy over which managerial control was essential to the achievement of the mission of the school district. I am unable to find support for this definitive interpretation. I believe it proposes too narrow a reading of the Legislature's purpose and may mistakenly suggest that the scope of representation under EERA is indistinguishable from negotiability under the NLRA.

Since school districts have only the power and authority delegated to them[2] and because numerous subjects which are bargainable in the private sector are covered by statute in the public sector, the Legislature has had an historical role in

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[2]See Education Code section 35161; Uhlmann v. Alhambra City High School District (1963) 221 C.A.2d 228 [34 Cal. Rptr. 341].

establishing employment policy in the educational sphere. EERA was the first comprehensive collective negotiating statute to be enacted by the Legislature. Therefore, I believe that, to some extent, limitations on scope as expressed by the defined terms and conditions reveal a legislative concern that some matters within its domain remain undelegated to the negotiations process.

In setting forth his theory, the Chairperson declares, "There is at the core of the managerial function certain policy matters which are so fundamental to the basic achievement of the agency's mission . . . that they may be properly excluded from the bargaining arena." (Ante, p. 13.) To the extent that this view suggests that enumeration exempts from negotiability only those decisions which in the private sector are denominated as lying "at the core of entrepreneurial control," I disagree and view the Legislature's limiting language in a broader sense.[3]

Secondarily, I do not agree with his view that the Legislature's enumerated list of terms and conditions rests on a conclusion that these items may not otherwise relate to wages

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[3]I have considered and addressed this interpretation of the Chairperson's analysis because of his reliance on his concurring opinion in Palos Verdes/Pleasant Valley (7/16/79) PERB Decision No. 96, citing Fibreboard Paper Prods. Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], and because it is unclear whether he distinguishes managerial prerogatives from educational policy. (Ante, pp. 12-13.)

or hours. To the contrary, leave, for example, bears a logical and reasonable relationship to both wages and hours. Time off from work as leave necessarily relates to hours worked, and compensation granted or withheld for such time off necessarily relates to wages. Similarly, benefits can be viewed as additional compensation for work and thus related to wages. Other enumerated subjects such as safety, for example, may be viewed as unrelated or more tangentially related to wages and hours.

In my view, however, many of the items specifically enumerated as terms and conditions would be negotiable under the "relating to" language of the scope section. This conclusion could suggest that, as to those subjects, their enumeration is superfluous since it does not broaden the scope of representation because they would be negotiable based on their relationship to wages and hours. I do not believe, however, that the enumerated terms and conditions, and the matters relating to wages and hours, are or were intended to be mutually exclusive or discrete categories of negotiable subjects. In sum, the enumeration of terms and conditions has interpretive significance but it does not only identify specific items which are logically or analytically distinct from wages or hours.

In my opinion, the enumerated list of terms and conditions reflects the fact that EERA, like other far-reaching

legislative enactments, emerged as a product of exhaustive lobbying by groups likely to be affected by the statute. The legislative process is undeniably one of compromise and, in my view, the language of section 3543.2 exemplifies the Legislature's response to the critical concerns of employees, employee organizations, employers, other interested parties, and, indeed, the Legislature's own concerns. By defining terms and conditions, I believe the Legislature responded to these concerns and sought to delineate certain items in order to avoid any possibility that through the interpretive process of PERB subjects it determined should be negotiable would be judged as being outside of scope. Class size is one such item. It is a matter of critical importance to educational employees and employers as well as to the Legislature because of the public policy issues necessarily involved. Class size has been afforded both negotiable and non-negotiable status when left to the interpretive process;[4] the Legislature

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[4]See Fullerton Union High School District (5/30/78) PERB Decision No. 53 at pages 8-9 and cases cited in footnotes 3 and 4. Additionally, the Legislature chose to specifically enumerate class size, even though it is also a subject which could have been deemed negotiable because of its relationship to wages and hours. In Clark County School District v. Local Government Employee-Management Relations Board (1974) 90 Nev. 442 [530 P.2d 114, 88 LRRM 2774] cited in Fullerton, the Nevada Supreme Court upheld the Nevada Board's finding, inter alia, that class size relates to hours because class density affects hours of preparation and post-class evaluation and relates to wages because it affects the total amount of work required for a fixed amount of compensation.

determined that class size should be subject to the bilateral negotiating process and, having so determined, was careful to specify this intent by enumerating it as a term and condition of employment.

The reason for, and the significance of, the exclusion of items from the enumerated list is more difficult to discern. Several explanations, however, are plausible. Certain items which do not appear among the enumerated list may have been excluded because the Legislature felt that their negotiability was assured based on a direct and compelling relationship to wages, hours or the enumerated terms and conditions. Other subjects, where the relationship is not manifest, may not have been enumerated because the Legislature perceived that reliance on the interpretive process and on the expertise of this Board to perform that task was appropriate.

As set forth in the foregoing discussion, I am unable to adopt the Chairperson's conclusion that the two objectives he sets forth are the sole reasons for the Legislature's enumeration of the terms and conditions of employment. The alternative considerations I have posed are also plausible explanations for the enumeration. In certain situations, these explantions or others may assist this Board in determining negotiability if they lend persuasive interpretive significance or clarify the legislative intent. The <u>absence</u> of a particular item from among the list of enumerated subjects, however, is

inconclusive and cannot be determinative of the question of negotiability. The language which permits negotiations as to matters "relating to" wages, hours and terms and conditions would be rendered meaningless if determinative significance were attached to the absence of an item from the enumerated list. Thus, in assessing negotiability, I do not see a statutory basis for concluding that a specific subject was intentionally omitted because the Legislature intended it to be non-negotiable. Rather, I agree with the Chairperson that a balancing test is to be used to assess negotiability, and I essentially agree with the test he sets forth.

All proposals must be logically and reasonably related to wages, hours or one of the enumerated terms. If this threshold test is met, the proposal must then be analyzed in terms of its degree of concern to the employees and the employer, the suitability of the negotiating process as a means of resolving the dispute, and, finally, whether the employer's obligation to negotiate would significantly abridge its managerial prerogatives or educational and public policy considerations. Because "managerial prerogatives" has been defined in the context of the private sector employer, it is helpful to specifically add to this balancing test a reference to the constraints on management in the public sector.

As in the case of the private sector, certain operational decisions will be excluded from scope as managerial

prerogatives. Other decisions, however, which may be unique to the public sector may involve serious and substantial public policy issues which the public school employer must consider.

An item otherwise related to legitimate employee concerns may be ill suited to the negotiating process because it is inextricably related to educational policy or bound to substantial considerations affecting the public. However, as the instant case demonstrates, consideration of these factors does not mean that the mere presence of educational or public policy considerations per se excludes a subject from scope. I agree with the Chairperson's discussion that such a view might eliminate virtually all subjects from negotiations. Likewise, the non-negotiability of educational policy matters does not mean that the impact of such matters on wages, hours and terms and conditions of employment are not negotiable. (San Mateo County Community College District (6/8/79) PERB Decision No. 94.) However, because some legitimate educational or public policy concerns may not be easily characterized as lying at the "core of entrepreneurial control" or as "essential to the agency's mission," I believe that these factors must be specifically noted and included in the equation when PERB balances competing interests in negotiability disputes.

I join in the Chairperson's opinion to the extent that it is in conformity with the foregoing discussion.

Barbara D. Moore, Member

Raymond J. Gonzales, Member, dissenting in part:

In this case, the Board confronts the issue of scope of representation for the first time since the split decision in Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96, a 1-1 decision in which Member Moore did not participate. That the Board remains divided is evidence of the complexity of the issue and the confusion engendered by section 3543.2.

In Palos Verdes, I noted that the interpretation of that section is arguable, contrasting language indicating that the Legislature intended a very limited scope ("The scope of representation shall be limited to," "All matters not specifically enumerated are reserved to the public school employer") with language indicating a broader intent ("matters relating to"). I concluded that "the language and structure of this provision suggests a far more restrictive scope of negotiations than is found in most other public sector legislation." (Supra, at pp. 16-17.)

The more I examine the language of section 3543.2, the more I am convinced that the Legislature intended to enact a narrow scope provision. The Legislature was aware of the ongoing debate as to whether the differences between the public and private sectors should be reflected in a narrower scope of representation in the public sector. In response, the Legislature chose not to follow the private sector model: instead of including all "terms and conditions of employment" within scope, the Legislature defined the phrase, limiting it to certain specified employment conditions.

Each member of the Board finds different reasons for the specific enumeration of negotiable terms and conditions of employment in section 3543.2. Chairperson Gluck believes the Legislature "sought only to satisfy two basic objectives." Neither constitutes an adequate explanation for the legislative action. The first was to exempt "certain matters of fundamental educational policy over which managerial control was to be preserved as essential to the achievement of the constitutional and statutory mission of the school district." (Gluck opinion, p. 10, ante.) Surely the Legislature could have satisfied that concern in a much more direct manner by simply including a management rights clause of the type found

in many other public employee negotiating statutes.[1] The second objective was to designate "specifically approved subjects which may bear no relationship to wages or hours of employment and, therefore, could not be covered by those two 'umbrella' terms." (Gluck opinion, p. 10, ante.) But using the phrase "terms and conditions of employment" without limitation would have met that objective. Further, as Member Moore notes, some of the enumerated items, such as benefits and leave policies, are in fact logically related to wages and hours. (Moore opinion, pp. 32-33, ante.)

Member Moore acknowledges that the specific enumeration is, to a certain extent, indicative of a legislative intent to impose limits on scope. But she also sees the list more as a guide to subjects to be included rather than those to be excluded, finding that the absence of a particular item cannot be determinative of the question of negotiability. I disagree. Certain controversial and significant subjects are conspicuously absent from the definition of terms and conditions of employment. It defies all common logic to believe that the Legislature would have left such subjects to be found negotiable on the basis of their relationship to an

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[1]See, e.g., Minnesota Public Employment Labor Relations Act, section 179.66; Pennsylvania Public Employe Relations Act, section 1101.702.

enumerated item. For example, the issue of layoffs has a certain logical relationship to both wages and hours. But I cannot believe that the Legislature intended such a significant issue as layoffs to be negotiable on the basis of this relationship; to me, the omission from the enumerated list of negotiable items clearly indicates an intent to exclude this subject from scope.

I find the Legislature's enumeration of specific terms and conditions of employment to be a significant indication of its intent to enact a narrow scope of representation. This intent is further manifested in section 3543.2 by the "limited to" language and the provision that "matters not specifically enumerated above are reserved to the public school employer and may not be a subject of meeting and negotiating . . ."[2]

It is within this context that the phrase "matters relating to" must be interpreted. This language has been the focus of those who wish to find a broad scope of representation. But, if the phrase is construed broadly, the Legislature's efforts

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[2]To a certain extent, the statutory inclusion within scope of "matters related to" the specifically enumerated items appears to conflict with the exclusion from scope of "all matters not specifically enumerated." On a literal level, this contradiction can be resolved by interpreting specifically enumerated matters to include matters relating to the listed terms and conditions of employment. If the phrase "matters related to" is interpreted broadly, however, the legislative intent in emphasizing the exclusion from scope of <u>all</u> matters not <u>specifically</u> enumerated will be thwarted.

to specifically limit negotiable terms and conditions of employment will be nullified; a "logical" relationship can be found between almost any negotiations proposal and an enumerated term of employment. I do not believe that the Legislature made an effort to develop a specific list of negotiable items only to make the list meaningless through the use of the term "relating to."

The more reasonable construction is that a matter is related to a specifically enumerated item if it is, in essence, an extension of that item. For example, an incentive pay plan is essentially an extension of the concept of wages. On the other hand, a promotional policy may be considered logically related to wages in that a promotion generally leads to a salary increase. But it is not an extension of wages since it includes considerations, such as proficiency, which go beyond questions of what salary should be paid for what work, and thus should not be negotiable under section 3543.2. This construction does not make the phrase "matters relating to" a nullity. The language was included, not to appreciably broaden the parameters provided by the enumerated items, but to allow a certain amount of flexibility and to eliminate definitional arguments wherein the parties debate whether a proposal is

encompassed within the meaning of a particular enumerated item.[3]

A cardinal rule of construction is that a construction making some words surplusage is to be avoided. People v. Gilbert (1969) 1 Cal.3d 475, 480. If the Legislature had intended "matters relating to" to receive the reading proposed by the majority, then many of the specifically enumerated terms and conditions of employment are superfluous. For example, health and welfare benefits are included on the list of negotiable terms of employment despite the logical connection between such benefits and wages. This inclusion would have been unnecessary if the Legislature had interpreted "relating to" as broadly as the majority interprets it. On the other hand, subjects such as shift differentials, overtime compensation, and supplemental pay are not listed because they are essentially extensions of wages.[4]

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[3]See, e.g., cases decided under the Iowa Public Employment Relations Act, which specifically lists mandatory subjects of negotiation. (Sec. 20.9.) There, scope disputes hinge on whether a proposal is included within a listed subject: in one case, the parties disagreed on whether health insurance for dependents and family members was included in the specifically listed term "insurance." Charles City School District v. PERB (Iowa S.Ct., 1979) 100 LRRM 3163.

[4]Compare Iowa Public Employment Relations Act section 20.9 which also lists specific negotiable subjects. The list includes wages and shift differentials, overtime compensation, and supplemental pay.

The Legislature's reasons for enacting a narrow scope of representation are rooted in the differences between the public and private sectors.[5] There are differences in mission and motivation:

> Employers in the private sector are motivated by the profit to be returned from the enterprise whereas public employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible.
>
> The employer in the private sector is constrained only by investors who are most concerned with the return for their investment whereas the public employer must adhere to the statutory enactments which control the operation of the enterprise. (Pennsylvania Labor Relations Bd. v. State College Area School District, supra, 90 LRRM 2081, 2082.)

There are differences in sources of funding: public institutions derive revenue from taxation as opposed to the sale of goods and services in the private sector. But the most significant distinction is in the impact of collective

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[5]These differences have been widely discussed in articles and cases. See, e.g., Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking (1975) 44 Cincinnati L.Rev. 669; Sackman, Redefining the Scope of Bargaining in Public Employment (1977) 19 Boston College L.Rev. 155; Corbett, Determining the Scope of Public Sector Collective Bargaining: A New Look Via a Balancing Formula (1979) 40 Montana L.Rev. 231; Pennsylavnia Labor Relations Bd. v. State College Area School Dist. (1975) 337 A2d 262 [90 LRRM 2081]; Ridgefield Park Educ. Assn. v. Ridgefield Park Bd. of Educ. (1978) 78 N.J. 144 [393 A.2d 278]; Charles City School District v. PERB, supra, 100 LRRM 3163.

negotiations on the employer's decisionmaking processes. Before the introduction of collective bargaining in the private sector, employers made decisions relating to terms and conditions of employment unilaterally; bilateral collective bargaining broadened this process by involving employees in these decisions. Governmental decisionmaking, on the other hand, has traditionally been viewed as a multilateral process involving the participation of many different interest groups. A bilateral negotiations process limits the participation of other interest groups in issues that are within the mandatory scope of negotiations. As I noted in Palos Verdes/Pleasant Valley, supra, PERB Decision No. 96, the main justification in the public sector for excluding a topic from mandated negotiations is that

> certain demands involve such significant public policy considerations that a determination of them in the isolated context of negotiations, limited to labor and management, would deprive other parties, namely the public, the parents and the students who also have a vital interest in the particular outcome, from having input. (Id. at p. 23.)

Furthermore, including an issue in scope may result in a particular response to that issue being imbedded in a multi-year contract which cannot be modified in response to changing conditions without the consent of the employee organization. In addition, under a binding arbitration clause, the terms of the contract may be interpreted and implemented by

an outside arbitrator, who has responsibility, not to the public, but only for enforcing the contractual agreement between the parties.

Some issues are appropriate for bilateral determination through collective negotiations; others are not. The Legislature expressed its view of which issues can be appropriately determined through negotiations when it replaced the meet and confer requirements of the Winton Act[6] with the good faith negotiations requirements of the EERA. A comparison of the scope of representation sections of the two acts indicates that the Legislature appreciably narrowed the range of issues subject to the more stringent collective negotiations process.[7] Its action should not be undermined by an expansive interpretation of "matters relating to."

In Palos Verdes/Pleasant Valley, supra, PERB Decision No. 96, I proposed a balancing test similar to that proposed today by Member Moore. After discussing some of the

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[6]Former Education Code section 13080 et seq., repealed Stats. 1975, chapter 961, effective July 1, 1976.

[7]Under the Winton Act, the scope of representation included:

> [A]ll matters relating to employment conditions and employer-employee relations, including, but not limited to wages, hours and conditions of employment. (Former Ed. Code sec. 13084.)

differences between the public and private sectors. I concluded:

> But where the [proposed negotiation subjects] are not enumerated, thus requiring a Board determination of what the relationship is between the proposed item and [an enumerated] topic, I am satisfied that such a determination may also require a balancing of competing interests, not merely an assessment of whether or not a logical connection exists between the enumerated topic and the proposed topic. Under the latter situation, the negotiability of a particular proposal would depend on whether it relates primarily to the specifically enumerated items found in section 3543.2 or to matters of broader educational policy in which the public's interests is more substantial than that of the public school employee. (Id., at p. 28)

Given the majority's position in this case, I no longer feel that a balancing test adequately protects the Legislature's intent to create a narrow scope provision. At best, balancing reflects a subjective determination of the weight to be given the factors on either side of the scale. At worst, it is an easy way to rationalize a predetermined decision.

A narrow reading of the phrase "matters relating to" best fulfills the legislative intent that districts and employee organizations negotiate only those issues which the Legislature has determined are suitable for resolution through the bilateral collective negotiations process. Those matters which are neither expressly enumerated nor extensions of enumerated

items are left to normal governmental decision-making processes, which allow participation by parents and taxpayers as well as employee groups.

Rest Time

I agree with the majority's finding that rest time is a negotiable condition of employment under section 3543.2.

Preparation Time

Hidden in the middle of footnote 14 of the majority decision is perhaps the most preposterous ruling of this Board to date, a ruling that has the potential of radically altering the very foundations of the teaching profession. The majority rules not only that preparation time is negotiable, but that preparation time is "the combination of professional and ministerial activities designed to expedite the presentation of educational subject matter." Professional preparation is the very hallmark of the teaching profession and should not be characterized simply as hours of work and thus subject to negotiations. The majority's decision that the time needed for planning and preparation of the subject matter to be covered in class is negotiable flies in the face of the whole notion of teaching as a profession. To say that a teacher should be allowed to read Moby Dick on school time in order to prepare to discuss it in class is like allowing the physician to read up on appendectomies in the surgery room while the patient lies etherized upon a table.

As professional employees, teachers have in the past been paid a salary as compensation not for a fixed number of hours of work but for whatever time it takes to perform their job effectively. Today's decision changes that, substituting a view of teachers as workers and trade unionists, putting in a specific number of hours daily, in place of teachers as professional educators. Teachers themselves should be incensed by this decision for, in a few strokes of the typewriter, it has taken their profession and converted it into just a job.

The bottom line in the majority decision is that the preparation for class, the grading of papers, and the compilation of grades must all be done within the confines of the teaching day. Where on-campus time was once considered only part of a teacher's responsibility, under the majority's guidance it will be seen as the total worktime. Additional preparation time will be seen as reducing their "unit of pay per unit of working time" (Gluck opinion, p. 17, ante) and thus not part of the job.

In the past, the fact that a teacher's work year included a paid three months off for summer vacation, two weeks for Christmas, a week for Easter, a dozen holidays, semester breaks, etcetera, was ample compensation for the rigors of classroom teaching. Now the majority makes a ruling that would continue the notion of four months paid vacation, but

additionally allow teachers to prepare themselves for teaching by doing it on the job and at the taxpayers' expense.

Furthermore, the majority fails to take into account the impracticality of its decision. Total hours at work, break time and lunch time can be uniform for all teachers. But the time necessary to prepare for teaching is idiosyncratic, varying according to the teacher's experience in teaching a particular class, the teacher's overall experience and ability, the teaching techniques used by the teacher, and other factors. As an illustration, a first year teacher assigned to a freshman English class may develop a lesson plan involving several essay exams and written homework assignments. This teacher is likely to spend much more time preparing than is a teacher who has taught freshman English for the past 10 years with a standardized lesson plan using mostly multiple choice tests. The differences in lesson plans and teaching techniques, in familiarity with the materials, and in overall teaching experience all contribute the differences in preparation time required to teach the same course. Thus, any set amount of preparation time is likely to provide some teachers with extra paid free time, while other teachers would have to put in additional time on their own anyway.

Finally, the majority's decision will unreasonably limit districts' discretion in important policy areas. Many significant managerial and educational decisions do not affect

a teacher's hours at achool and in the classroom, but do have an impact on preparation time. A change in textbooks requires teachers affected by the change to spend some additional time familiarizing themselves with the new text and developing new lesson plans. A change in course content also requires new lesson plans. Teaching a class one has never taught before requires additional preparation. Thus, districts will lose the flexibility to respond to changing enrollments by changing class assignments. For example, a district would be unable to assign a teacher who has previously taught only senior English to teach freshman English without first negotiating the impact of that decision on the teacher's preparation time.

While it is true that negotiating the impact of a decision is not exactly the same as negotiating the decision itself, impact negotiations limit management's ability to adjust to changing circumstances. An unexpected increase in enrollment in September may require schedule changes and new class assignments. The majority decision would seem to require the district to hold those changes in abeyance during the time it takes to negotiate the impact of the new work assignments.

Also impact negotiations may themselves affect the district's decision making. I cannot believe that the Legislature, after making a clear separation in section 3543.2 between negotiable terms and conditions of employment and educational policy matters, intended to allow educational

policy decisions to be made at the negotiating table via the backdoor of negotiating the decisions' impact on preparation time.

Thus I do not believe that preparation time, as defined by the majority, is a negotiable subject. Teachers have, however, certain ministerial tasks which must be done on campus: checking out projectors and other equipment, running off dittos, turning in attendance forms, checking their mailboxes, etc. Negotiating for a certain amount of time during the workday for the performance of these types of campus duties may be appropriate, but there is no way I could interpret negotiable preparation time to include academic preparation for the presentation of subject matter in the classroom.

The majority's ruling indicates that it has no sensitivity to the unique nature of teaching as a profession. To them, it is merely another job, to be treated like other jobs in the private sector cases they cite so often. By relying on cases like Amalgamated Meat Cutters,[8] the majority gives school children and parents no more consideration in cases dealing with collective negotiations than sides of beef hanging on steel hooks in frozen meat lockers. To attempt to resolve the

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[8] Amalgamated Meat Cutters v. Jewel Tea (1965) 381 U.S. 676 [59 LRRM 2376].

issues of scope of representation by using private sector collective bargaining history is to relegate our schools to the status of assembly or disassembly plants.

Raymond J. Gonzales, Member

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN MATEO ELEMENTARY TEACHERS ASSOCIATION, CTA/NEA, Charging Party, vs SAN MATEO CITY SCHOOL DISTRICT, Respondent.	Case No. SF-CE-36 Recommended Decision January 10, 1978

Appearances: Rubin Tepper, Attorney, for San Mateo Elementary Teachers Association CTA/NEA; J. Michael Taggart, Attorney (Paterson & Taggart) for San Mateo City School District.

Before Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On December 13, 1976, the San Mateo Elementary Teachers Association CTA/NEA (hereinafter, "Association") filed an unfair practice charge against the San Mateo City School District (hereinafter "District") alleging a violation of Government Code Section 3543.5(c)[1] in that the District unilaterally lengthened the instructional day[2] without meeting and negotiating. An amendment to the charge was filed on March 28, 1977 alleging that

[1]All statutory references are to the Government Code.

[2]For present purposes, "instructional day" is defined as the number of minutes per day during which students are in contact with teachers.

the parties had reached agreement on wages but not hours, that in subsequent negotiations the District refused to negotiate in good faith concerning teacher preparation and rest time, and that the District was considering further unilateral change in the instructional day. The District takes the position that the instructional day is not within the scope of representation(§ 3543.2).

On July 18, 1977, a hearing was held on the charge before this hearing officer at the Public Employment Relations Board (hereinafter PERB or EERB),(formerly the Educational Employment Relations Board) Regional Office in San Francisco. At the close of charging party's case, the respondent District moved to dismiss the charge on three grounds:

a. the allegations relating to the 1976-77 school year were mooted by the parties' 1976-77 collective negotiations agreement;

b. the allegations pertaining to the 1977-78 negotiations are premature since the subject of "hours" still was being negotiated;

c. the allegation concerning the change in the instructional day for the 1977-78 school year should be deferred to the grievance procedure in the 1976-77 collective negotiations agreement.

The motion was denied on all grounds without prejudice to renewal in the District's post-hearing brief. The mootness and prematurity grounds are argued in the District's brief, but not the issue of deferral to the contract grievance procedure.

The parties stipulated that the District and the Association respectively are an employer and employee organization

within the meaning of the Educational Employment Relations Act (EERA).[3]

ISSUES

1. Did the parties' collective negotiations agreement for the 1976-77 school year moot the allegations concerning the District's unilateral change in the instructional day during the 1976-77 school year?

2. Were the two unilateral increases in the instructional day by the District made in violation of its duty under Government Code § 3543.5(c) to meet and negotiate in good faith?

3. During the 1977-78 negotiations, has the District negotiated in good faith regarding the instructional day, teacher preparation time and teacher rest time?

FINDINGS OF FACT

A. Mootness Issue

On January 1, 1977, the District unilaterally changed Policy and Regulation 6112, increasing the instructional day by varying amounts in different grades and schools in the District. At Audubon school, for example, the change reduced teachers' Wednesday afternoon preparation time by 30 minutes. The total workday for all teachers remained the same, 7-1/4 hours.

The Association's initial negotiations proposal in July, 1976 for the 1976-77 school year included proposals on "instructional duty time," "planning time" and "relief time."

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[3] Gov. Code §§ 3540, *et seq*.

The parties entered into a collective negotiations agreement on February 1, 1977 to continue in effect through June 30, 1977 and thereafter until written notification by one of the parties. Although negotiations for the following school year began soon after this agreement was signed, there is no evidence that the parties treated the negotiations as a rescission of their previous agreement. There being no evidence of a successor agreement, in this opinion it will be presumed that the parties' February 1, 1977 agreement still was in effect. In paragraph C of the Agreement, the Association waived the right to further negotiations for 1976-77 "except in cases where the District has initiated change ... ." Paragraph D.8, the "zipper" clause, in which the Association waives the right to negotiate on any matter whether or not covered in the agreement, is expressly made subject to the proviso that "[f] or 1976-77 this article shall not negate item C. ." Paragraph A also provides that there will be no further negotiations for 1976-77 except as might occur under paragraph C. Paragraph A further contains a list of regulations which the District agreed not to change. Omitted from the regulations on the list affecting hours is Regulation 6112 concerning the instructional day.

Witnesses for both parties testified that it was agreed that the dispute concerning negotiability of the instructional day would be submitted to the EERB for determination. Dr. David Shapiro, the District's associate superintendent and negotiator, further testified that if the EERB rules that the instructional day is within the scope of representation, the

above-quoted "reopener" provision of the agreement could be utilized by the Association to negotiate the instructional day. This understanding is memorialized in a March 8, 1977 memorandum from Dr. Shapiro to Mr. John Secor, the Association's executive director. This memorandum also states that the Association could negotiate the instructional day if it became common, statewide practice to do so.

B. Instructional Day, Teacher Preparation and Rest Time

In addition to the increase in the instructional day effective January 1, 1977, on April 19, 1977 the school board unilaterally adopted a further increase in the instructional day to be effective at the start of school in September, 1977. The Association had ample notice of the increase prior to its adoption. The reason for these increases in instructional day was parental concern that the District's instructional day was the shortest among the school districts in the County. At Audubon school, this second increase in the instructional day will eliminate teachers' Wednesday afternoon planning time.

The lengthened instructional day would increase Audubon teachers' workday by five minutes if they are required to be at school 30 minutes before and after the students as provided in District policy. However, District policy allows school principals to vary this 30 minute requirement and principals have been directed not to exceed a 7-1/4 hour workday for teachers in the 1977-78 school year.

Throughout the 1976-77 negotiations between the parties, and continuing to the date of hearing, the parties

stipulated that the Association has taken the position that the length of the instructional day is negotiable, while the District took the position in the 1976-77 negotiations that the instructional day was non-negotiable.

Negotiations for 1977-78 commenced soon after the signing of the 1976-77 agreement on February 1, 1977. In the 1977-78 negotiations the Association has asked for not less than one hour daily to be used exclusively for lesson planning and preparation and related teaching duties. The Association additionally asked for twenty minute "rest periods" for each two hours of student instructional time. The District's third counter-proposal on "hours" provided in pertinent part that "[d]aily time in excess of instructional and other duty time is designated for unit member use," and that teachers will not be required to work more than two hours without a "break for personal needs." In the middle schools (grades 7-8), the District proposed that the student passing time between periods would constitute this break. It proposed no specific rest time for teachers in grades K-6. Under the District's proposal, teachers could use the "excess" time for preparation if they wish.

With respect to the instructional day issue in the 1977-78 negotiations, the Association initially adopted its proposal from the year before which specified the number of minutes of "instructional duty time" for teachers in the various grade levels. The District's initial counterproposal on "hours" did not respond to the "instructional duty time" issue, nor do any of its later proposals. On March 8, 1977, the District stated its negotiations

position that the instructional day was non-negotiable. There are two further Association negotiations proposals in evidence, respectively dated February 24 and June 28, 1977. Neither one contains a proposal on "instructional duty time" or the instructional day, nor is there evidence in the record of negotiations for 1977-78 on this specific item. To the date of the hearing, no further negotiations proposals were made by the parties.

In negotiations, both parties agreed that the teachers' workday should be 7-1/4 hours and that the duties of a teacher, including lesson preparation and planning, require more than 7-1/4 hours per day. There is an inverse relationship between the instructional day and teachers' "excess" time during the workday.

DISCUSSION AND CONCLUSIONS OF LAW

1. Reservation of the negotiability of the instructional day in the 1976-77 collective negotiations agreement.

Construing the parties' February 1, 1977 collective negotiations agreement in light of the testimony presented by both parties,[4] it is apparent that the Association reserved the right to reopen negotiations on any subject in which the District initiated change effective in the 1976-77 school year. The unilateral modification by the District of Policy and Regulation

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[4]Although Section 3541.5(b) prohibits the EERB from enforcing agreements between the parties, by analogy to National Labor Relations Act precedent this Board may construe a collective negotiations agreement where necessary to the determination of an unfair practice charge. NLRB v. C & C Plywood Corp. (1967) 385 U.S. 421, 64 LRRM 2065.

6112 to lengthen the instructional day is one such change. The intent of the parties was that if the instructional day eventually was found to be negotiable, the collective negotiations agreement would not bar the Association from requesting to negotiate the subject.

In view of the circumstances, it would be contrary to the parties' understanding and inherently unfair to hold that the issue concerning the District's January 1, 1977 unilateral change in the instructional day is mooted by the parties' collective negotiations agreement.

2. The unilateral increases in the instructional day and related negotiations.

Since the instructional day is not specifically enumerated in § 3543.2 as within the scope of representation, it is negotiable only if it is a "matter relating to" an enumerated item. In this case, "hours of employment" seems to be the only likely candidate.

Decisions from other jurisdictions offer little guidance. There is no analogue to instructional day in private industry. In other states in which decisions relating to the subject matter at issue have been found, the definitions of the scope of representation do not limit terms or conditions of employment to certain enumerated items as does § 3543.2. Accordingly, these states have little trouble determining that instructional or preparation time are related generally to terms or

conditions of employment. See, e.g., Nazareth Area Education Association (Pa. 1972) 2 PPER 194; Springfield Education Association v. Springfield School District, et al. (Oregon 1976) 547 P.2d 647, 92 LRRM 2583; West Hartford Education Association v. De Courcy (Conn. 1972) 295 A.2d 526, 80 LRRM 2422, at 2430; Clark County School District v. Local Government Employee-Management Relations Board (Nev. 1974) 530 P.2d 114, 88 LRRM 2774. In the Connecticut and Nevada cases, the state supreme courts also held "teacher load" (essentially class plus preparation time) to be negotiable.[5]

However, some states hold these items to be non-negotiable because they involve educational policy and therefore are a matter of management prerogative. Nazareth Area Education Association, supra; Springfield Education Association v. Springfield School District, et al., supra; Somers Faculty Association v. Somers Central School District (N.Y. 1976) 9 PERB 3022, at 3023; Oak Creek Education Association v. Wisconsin Employment Relations Commission (Wisc. 1975) 91 LRRM 2821, at 2824.

Even though the instructional day and preparation time may be matters of educational policy, it must be recognized that they nevertheless may have an effect on a negotiable item such

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[5]See also, Pasco County School Board (Fla. 1976) 3 FPER 9, at 14-15, which held "planning days" to be negotiable, and Town of Arlington and IAFF, Local 297 (Mass. 1976) 3 MLC 1263, a hearing officer decision holding that rearrangement of the work day of fire alarm operators, without changing the starting or ending times, is a change in "hours" and therefore negotiable.

as hours. Thus, in State of New Jersey (Stockton State College) (1977) 3 NJPER 62, and in West Irondequoit Board of Education (N.Y. 1971) 4 PERB 3725, although changes in student class hours and class size respectively were said to be non-negotiable, it was held in both cases that the impact of the changes on negotiable items had to be negotiated. See also, Oak Creek Education Association v. Wisconsin Employment Relations Commission, supra.

In the present case, both parties agree that teaching duties, including lesson planning and preparation, require more time than the teachers' 7-1/4 hour workday. This being the case, anything which decreases the time during the workday which teachers can use for preparation (such as an increase in the instructional day), will increase the amount of time teachers must spend on work-related duties beyond the 7-1/4 hour workday.

Although the teachers' workday in this case nominally is 7-1/4 hours, their real workday is longer and includes time spent in preparation outside of the 7-1/4 hours. Therefore, an increase in the instructional day, which in this case decreased in-school preparation time at least for some teachers, has the effect of increasing the actual number of hours of work for these teachers. Accordingly, it is found that in this case the District violated its duty to negotiate in good faith under § 3543.5(c) by its unilateral change in the instructional day for the 1976-77 school year in that this change had an impact on teachers' working hours, and therefore is a matter relating to "hours of employment," a negotiable subject under § 3543.2.

It follows that the District further violated its duty to negotiate in good faith by refusing to negotiate the instructional day upon the Association's request during the 1976-77 negotiations.

Turning to the instructional day issue in the 1977-78 negotiations, it seems that although the Association initially made a proposal on the subject, it dropped all reference to the instructional day in its subsequent negotiations proposals. The record is silent concerning the circumstances or reasons for this negotiations change. Under these circumstances, although the Association argues the issue in its brief, there is insufficient evidence to determine whether in the 1977-78 negotiations the District negotiated in good faith concerning the instructional day. Since the Association has the burden of proof (Cal. Admin. Code, Tit. 8, § 35027) its charge must fail on this point.

With respect to the second unilateral increase in the instructional day, adopted by the District on April 19, 1977 to be effective at the start of school the following September, it is noted that it came <u>after</u> the Association dropped its negotiations proposal concerning the instructional day. Although it knew of the proposed increase, there is no evidence that the Association requested to negotiate the matter prior to its adoption or implementation. Even where the employee organization protests the employer's proposed unilateral action and files an unfair labor practice charge, the NLRB has held that failure to request to negotiate the matter constitutes a waiver of its statutory rights.

American Busline, Inc. (1967) 164 NLRB 1055, 65 LRRM 1265, Medicenter Mid-South Hospital (1975) 221 NLRB 670, 90 LRRM 1576.

In the present case, however, it would have been futile for the Association to request to negotiate. Throughout the current and previous negotiations, the District continuously took the position that the instructional day was non-negotiable, and in the March 8, 1977 memorandum referred to in the Findings of Fact, the District stated it would not alter its position except upon an EERB decision or contrary statewide practice. Previously, the District had taken similar unilateral action in the face of the Association's request to negotiate. The situation is analogous to the statutorily-provided "futility" exception to the requirement of exhaustion of the contract grievance procedure prior to initiating unfair practice proceedings. (See § 3541.5(a).) Under the circumstances, the Association cannot be blamed for its failure to request to negotiate the instructional day increase.

Furthermore, the District did not raise this issue of waiver in its Answers to either the original charge or the amendment, or at the hearing or in its brief. "Waiver" is an affirmative defense, which if not raised, is itself waived. Witkin, Cal. Procedure 2d, § 945, p. 2525.

3. Teacher preparation time as an item of negotiations.

As previously indicated, both parties agree that teachers' duties, including preparation, require more time than is available in the 7-1/4 hour workday. Thus, as previously discussed, increasing teacher preparation time during the workday effectively

would reduce the total number of actual hours during the day that teachers are required to spend on work-related duties, and vice-versa. Therefore, under the facts in this case, preparation time is a matter related to hours of employment and is a negotiable item within the scope of representation (§ 3543.2).

However, although the District contends that preparation time is non-negotiable, it also argues that it has satisfied its obligation to negotiate in good faith by its proposal that unassigned time during the schoolday could be used by teachers as they see fit. But this really is a proposal of no real significance in that it merely states the obvious, i.e., when the District has not assigned duties to a teacher, the teacher has unassigned time at his or her disposal. It does not address the issue properly placed on the table by the Association of a set amount of preparation time during the workday not subject to other duty assignments by the District. Under the District's proposal, it theoretically could fill the entire 7-1/4 hour workday with duty assignments, leaving no time for preparation. The amount of time available for preparation thus would remain entirely within the District's discretion and really would be no different from the situation which obtained prior to negotiations.

The District also urges that is is premature to judge whether it has negotiated in good faith because at the time of the hearing, negotiations were still in progress and the parties' negotiations positions could be changed at a later date. But at the time of the hearing the parties already had been in negotiations

almost six months. The District's "unassigned time" proposal was made only three weeks before the hearing and, as just discussed, was not a substantive change in the District's position. It is apparent that since the District never changed its position that the instructional day is non-negotiable, it could not make a more meaningful proposal on preparation time as such a proposal would infringe on its claimed right to make unilateral changes in the instructional day.

Accordingly, it is found that under the circumstances of this case, preparation time is negotiable, the District has failed to negotiate this subject in good faith, and therefore it has violated § 3543.5(c).

4. Teachers' rest time as an item of negotiations.

There is evidence as to the specific uses proposed for this time. The hearing officer presumes that it would be reserved for teachers' personal, rather than work-related, needs.

Both parties have made negotiations proposals on teachers' rest time, but the Association alleges that the District has not negotiated the subject in good faith. However, the hearing officer finds that it is first necessary to determine whether it has been demonstrated that rest time is a negotiable subject in this case. Even though no party raises the issue, § 3543.2 prohibits negotiations on any subject not specifically enumerated as within the scope of representation. Therefore, even though the parties do not raise the issue, it would be inconsistent with this clear statutory mandate, and would not "effectuate the policies of [the EERA]" (§ 3541.5(c)), for the PERB to order a party to negotiate in good faith over a non-negotiable item.

It may be that arguments could be made relating teacher rest time to "safety conditions of employment," or other negotiable subjects under § 3543.2. In the present case, the Association seeks to relate rest time only to teachers' "hours of employment." But in this case the evidence is insufficient to show how the amount of rest time for teachers might be related to hours of employment. Since the Association has the burden of proof, Cal. Administrative Code, Title 8, §35027, and it has not been shown that rest time is related to a negotiable subject under § 3543.2, the hearing officer declines to determine whether the District negotiated in good faith on this item.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to Government Code § 3541.5(c), it is hereby ordered that the San Mateo City School District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally taking action on matters within the scope of representation without meeting and negotiating upon request with the San Mateo Elementary Teachers Association.

2. Failing or refusing to meet and negotiate in good faith with the San Mateo Elementary Teachers Association upon request with regard to teacher preparation time.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind its two unilateral increases in the instructional day to be effective not later than 60 days after issuance of this Recommended Order; or

2. In the alternative, meet with the San Mateo Elementary Teachers Association and resolve this dispute in a manner which is mutually acceptable to the parties and advise the San Francisco Regional Director of such alternative resolution.

3. Prepare and post a copy of this Order until rescission of the instructional day increase at its headquarters office and in each school at a conspicuous location where notices to certificated employees are customarily posted.

4. At the end of the posting period, notify the San Francisco Regional Director of the action it has taken to comply with this Order.

IT IS FURTHER ORDERED that the unfair practice charge is DISMISSED with respect to the allegations that the San Mateo City School District violated Government Code § 3543.5(c) by failing to meet and negotiate in good faith with the San Mateo Elementary Teachers Association during the 1977-78 negotiations regarding the length of the instructional day and teacher rest time.

Pursuant to Cal. Admin. Code, Tit. 8, Section 35029, this Recommended Decision and Order shall become final on January 23, 1978, unless a party files a timely statement of exceptions within seven (7) calendar days of service. See Cal. Administrative Code, Tit. 8, Section 35030.

Dated: January 10, 1978

GERALD A. BECKER

Hearing Officer